Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-349

L. W. UMPHRES,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM SIMON
JOHN S. KINGDON
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
(202) 872-8800

Of Counsel:

HOWREY & SIMON
Washington, D. C.

Counsel for Respondent Shell Oil Company

WILLIAM G. WINTERS, JR.
One Shell Plaza
Houston, Texas 77002
(713) 220-5891

October 1, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-349

L. W. UMPHRES,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals for the Fifth Circuit is reported at 512 F.2d 420 (5th Cir. 1975). The order denying petitioner's motion for rehearing *en banc* is noted at 515 F.2d 1184 (5th Cir. 1975).

QUESTION PRESENTED

Whether the entry of directed verdicts by the trial court on the basis of a lack of evidentiary support for

petitioner's various claims and the *per curiam* affirmance of those directed verdicts by the Court of Appeals presents any substantial legal issue for resolution by this Court on writ of certiorari.

STATEMENT OF THE CASE

Petitioner's private antitrust action included allegations of violations of the Sherman Act (15 U.S.C. § 1); the Clayton Act (15 U.S.C. § 3); and the Robinson-Patman Act (15 U.S.C. § 13(a)) arising from his business as a retail service station dealer in Houston, Texas leasing stations and purchasing products from respondent Shell Oil Company ("Shell"). The trial was preceded by more than two years of pretrial discovery. In five days of trial petitioner attempted to prove (1) that respondent tied the leasing of its service stations to the purchase of its gasoline; (2) that respondent tied the leasing of its service stations to the purchase of its tires, batteries and accessories; (3) that respondent tied the leasing of its service stations to the purchase of trading stamps and the use of its promotional games; (4) that respondent fixed the price of gasoline at the wholesale level by a horizontal conspiracy with other suppliers; (5) that respondent fixed the price of gasoline at the retail level by coercing petitioner to follow respondent's price suggestions; (6) that respondent engaged in price discrimination in the sale of its automotive accessories; and (7) that respondent terminated petitioner's leases on four separate service stations in violation of federal antitrust laws.

The evidence adduced during petitioner's case, by both direct and cross-examination, showed that respondent had not violated any antitrust law. There were no leases, agreements or contracts which contained any exclusionary provisions regarding gasoline, automotive accessories, stamps or promotional games (Tr. 312; 800; Plf. Ex. 2,

3, 4, 5; Def. Ex. 33).[1] Petitioner's own testimony, and the testimony of his own witnesses, demonstrated both the absence of coercion and that dealers had complete freedom to purchase or not to purchase Shell products and promotions (Tr. 123; 368; 549; 720; 834-835; 846; Def. Ex. 4). The evidence presented by petitioner on price discrimination failed to show either that respondent had engaged in any discriminatory sales to two purchasers in the same line of business, or that any such discrimination could have caused injury to petitioner (Tr. 76; 856-858).

Petitioner's evidence relating to horizontal and vertical price fixing was equally deficient. The only testimony concerning horizontal price fixing at the wholesale level between Shell and unidentified major oil companies related to fluctuations in the *retail* price of gasoline at but five of the approximately 2800 service stations in the Houston area (Tr. 759). Although answers by various major oil companies to petitioner's depositions upon written interrogatories showed wholesale gasoline prices in the Houston area for the relevant time period, and those sworn answers were on file in the Clerk's office, petitioner failed to offer the available wholesale price data into evidence. As recognized by the Fifth Circuit:

> Appellant failed to produce evidence establishing the existence of an intercompany price-fixing agreement, arrangement, or conspiracy at the retail level, or at the wholesale level that might have been reflected in the alleged fluctuations of retail prices (512 F.2d at 422).

The petition misstates the record in material respects in its "Statement of Case" (Pet. 5-6). Without a single

---

[1] Respondent has included citations to the record to support factual statements. In contrast, the petition is devoid of record references and contains a wholly unsupportable characterization of the case (Pet. 5-6). The correct factual statements appear in the record and in the opinion of the Fifth Circuit Court of Appeals.

reference to the record, for indeed there is none, the petition implies that the claims of "coercive tactics" and "threats" were substantiated in the record. The Court of Appeals found no evidence of coercive pressures, citing instead petitioner's *own* sworn testimony that:

> It was my decision to change the prices [of gasoline] at all times at any of my stations (Tr. 426; 512 F.2d at 422).

Petitioner's testimony contradicted the claims in his complaint, and the trial court and the appellate court concluded that there were insufficient facts upon which to base any finding of antitrust liability. The Fifth Circuit affirmed the District Court's rulings on liability in all respects, summarizing the record by concluding:

> The record in this case reflects the respective roles of an oil company and its dealer in a competitive market where the oil company must distribute its products within the structures of the antitrust laws. Plaintiff failed in his effort to prove any one of the alleged violations of those laws with evidence sufficient to warrant submission to the jury (512 F.2d at 423).

ARGUMENT

The *Per Curiam* Decision Of The Court Of Appeals Was Correct And Presents No Important Federal Question Or Conflict Of Decisions

Despite petitioner's attempt to couch his petition in terms of conflicting decisions and constitutional questions, this matter involves only the factual record as presented at trial and reviewed on appeal. As such, it clearly does not merit the exercise of this Court's discretionary jurisdiction and review.

The Fifth Circuit Court of Appeals expressly pointed out that their consideration of respondent's directed ver-

dict motions was in accordance with the admittedly correct legal standard:

> "Our standard for reviewing directed verdicts was explicated in *Boeing Co.* v. *Shipman*, 5 Cir., (en banc), 1969, 411 F.2d 365:
>
> > On motions for directed verdict . . . the Court shall consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. 411 F.2d at 374.
>
> See also *Panotex Pipe Line Co.* v. *Phillips Petroleum Co.*, 5 Cir., 1972, 457 F.2d 1279, affirming a directed verdict in an antitrust case.
>
> (1) Reviewing the record on appeal with the *Boeing* principles in mind, we conclude that the District Court did not err in granting Shell a directed verdict" (512 F.2d at 422).

The sole question raised by this petition is whether the Fifth Circuit Court of Appeals, in reviewing the factual record, correctly concluded that the record facts and permissible inferences therefrom pointed so strongly and overwhelmingly in favor of respondent that reasonable men could not have arrived at a contrary verdict (512 F.2d at 422). Petitioner asks this Court to engage in yet another factual review of the District Court's

directed verdict decisions. There is no substantial federal question for this Court's consideration.

The petition errs in asserting that the appellate court weighed the credibility of the evidence and failed to give petitioner all favorable inferences (Pet. 9).[2] Nowhere in the panel's decision does the court choose to disbelieve petitioner's witnesses or refuse to draw reasonable inferences in favor of petitioner. The court assumed the truth of petitioner's evidence, allowing for such reasonable inferences as were warranted by the evidence, and simply concluded that petitioner's case was "clearly insubstantial" (512 F.2d at 422).

The Court of Appeals' determination was consistent with *Brady* v. *Southern Railroad Co.*, 320 U.S. 476, 479-480 (1943) which is relied on by petitioner. In *Brady* this Court expressly sanctioned the entry of directed verdicts in a case such as this, declaring:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict . . . without submission to the jury . . . . By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

This case involves only questions of the sufficiency of evidence that are unique to this proceeding. The factual

---

[2] Petitioner suggests that it was improper for the appellate court to refuse to infer a horizontal price fixing conspiracy at the *wholesale* level where petitioner's only evidence consisted of price fluctuations "obtained from a limited source-only five out of over 2,800 [retail] service stations in the Houston area" (Pet. 3). However, *Boeing Co.* v. *Shipman* and decisions from other circuit courts on the proper standard for review of directed verdicts are in accord in holding that only *reasonable* inferences must be drawn in favor of the non-moving party. To infer a price fixing conspiracy from this record, as petitioner suggests, would invite a speculative jury verdict on unsubstantiated claims.

record was fully considered and properly ruled upon by both the District Court and the Court of Appeals in accordance with established legal rules. Under these circumstances this Court's admonition in *United States* v. *Johnson*, 268 U.S. 220, 227 (1925), that it "do[es] not grant certiorari to review evidence and discuss specific facts" should be the controlling factor in ruling upon this petition.[3]

The District Court granted respondent's motions for directed verdicts on all issues of liability and damages. The contested issues relating to the District Court's damage rulings were separately briefed and argued by the parties on appeal. The Fifth Circuit Court of Appeals, having concluded that there was no liability established on any of petitioner's antitrust claims, expressly declined to consider the damage issues (512 F.2d at 423). If this petition is granted, and this Court after reviewing the factual record concerning liability remands the case for further proceedings, the remand would necessarily be to the Fifth Circuit Court of Appeals—not to the District Court—for review of the correctness of the District Court's directed verdicts on damages. *Powell* v. *McCormack*, 395 U.S. 486, 500 n.16 (1969); *Utah Pie Co.* v. *Continental Baking*, 386 U.S. 685, 704 (1967).

CONCLUSION

The practice of this Court has been to grant writs of certiorari only in cases involving either principles of fundamental importance to the general public or a direct conflict in circuit court opinions. Respondent respectfully

---

[3] In *Brady, supra*, this Court also noted the limited purpose served by its review of factual matters:

> An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury . . . is of no doctrinal importance. Every case varies (320 U.S. at 480).

submits that the instant petition presents no important question of federal law and no conflict of decisions calling for settlement by this Court. The *per curiam* decision of the Court of Appeals for the Fifth Circuit measured the factual record at trial against the appropriate legal standard for directing verdicts. As such it does not merit review by this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM SIMON
JOHN S. KINGDON
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
(202) 872-8800

Counsel for Respondent
Shell Oil Company

Of Counsel:

HOWREY & SIMON
Washington, D. C.

WILLIAM G. WINTERS, JR.
One Shell Plaza
Houston, Texas 77002
(713) 220-5891

October 1, 1975